IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 125 of 2001.

Reserved on: 10.09.2007.

Decided on: 28.09.2007.

Hans Raj & Another. … … **Petitioners.**

Versus

The State of H.P. … … **Respondent.**

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1] *Yes.*

For the Petitioners: **Mr. Bhupinder Ahuja, Advocate**

For the Respondent: **Mr. M.S. Chandel, Advocate General with Ms. Meenakshi Sharma, Deputy Advocate General.**

Rajiv Sharma, Judge:

The brief facts necessary for the adjudication of this petition are that the petitioners are cultivating and growing herbs in district Mandi. The petitioners have taken about 700 bighas of land on short term lease from the farmers of patwar circle Shiligar and Janjehli in Tehsil Thunag and patwar circle Majhothi in Tehsil Chachyot, District Mandi, H.P. for cultivating medicinal herbs "Hypericum Perforatum". A notification has been issued by the Financial Commissioner-cum-Secretary (Forests) to the

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[1] *Whether reporters of local papers may be allowed to see the judgment? Yes.*

Government of Himachal Pradesh under Sections 41 and 42 of the Indian Forest Act, 1927 and the Rules framed thereunder whereby the export permit fee of Rs.250/- has been levied for “Hypericum Patulum”. The petitioner No.1 submitted an application to the Divisional Forest Officer, Nachan Forest Division, Gohar for the issuance of export permit for the estimated weight of 90-100 metric tons of “Hypericum Perforatum”. The Range Forest Officer, Jajehli recommended to the Forest Department the case of the petitioners for issuance of export permit for “Hypericum Perforatum”. The petitioners were informed that the plant “Hypericum Patulum” will also include the plant “Hypericum Perforatum” and shall attract the Export Permit Fee at the rate of Rs.250/- per quintal.

Mr. Bhupinder Ahuja had strenuously argued that the medicinal plant “Hypericum Perforatum” cannot be treated at par with “Hypericum Patulum”. He further contended that the State cannot impose any export permit fee on the species “Hypericum Perforatum” and his clients are entitled to get the export permit without paying any fee. The learned Advocate General had strenuously argued that the family and genus of both the plants, i.e. “Hypericum Perforatum” and “Hypericum Patulum” are the same and only the species is different and the same rate of export, i.e. Rs.250/- is to be levied for the issuance of export permit for “Hypericum Perforatum”.

Before this Court considers the rival submissions of the learned Advocates, it will be necessary to refer to few salient

features of the Indian Forest Act, 1927 for better appreciation of the facts.

Sub-Section (4) of Section 2 defines the forest produce thus:-

> (4) "forest-produce" includes–
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> (a) the following whether found in, or brought from, a forest or not, that is to say – timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds, [kuth] and myrabolams, and
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> (b) the following when found in, or brought from a forest, that is to say–
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> (i) trees and leaves, flowers and fruits, and all other parts of produce not hereinbefore mentioned, of trees,
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> (ii) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,
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> (iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and
>
> (iv) peat surface soil, rock and minerals (including lime-stone, laterite, mineral oils, and all products of mines or quarries);

[(4A) “owners” includes a Court of Wards in respect of property under the superintendence or charge of such Court;] .

Section 41 provides that the State Government may make rules to regulate transit of forest produce. The State of Himachal Pradesh has framed the Rules called “The Himachal Pradesh Forest Produce Transit (Land Routes) Rules, 1978”. Rule 11 prohibits transport of forest produce. Sub-rule (1) of Rule 11 provides that no person shall transport or cause to be transported any forest produce by land routes, without obtaining pass (Annexure ‘A’) from the concerned Divisional Forest Officer or any other officer so authorised. Sub-Rule (5) of Rule 11 provides that the issuing authority shall also determine the other conditions subject to which the pass shall be issued and shall also determine the period for which the pass shall remain valid. A fee is to be leviable in case of medicinal plants as per Annexure ‘D’. Sub-Rules (1) and (5) of Rule 11 are reproduced as under:-

“11. Prohibition on transport of forest produce.– (1) No person shall transport of cause to be transported any forest produce (except kuth), [or forest produce obtained from Poplar, Albizzia, Willow, Bhanuai, Eucalyptus and Mulbury] by land routes, without obtaining pass (Annexure ‘A’) from the concerned Divisional Forest Officer or any other officer so authorised.

[5. The issuing authority shall determine the other conditions subject to which the pass shall be issued and shall also determine the period for

which the pass shall remain valid. However, the validity of any pass shall under no circumstances exceed a period of six months including any extensions allowed. A fee of Rs.25 shall be leviable for the issue of such a pass except in case of medicinal plants for which the fee shall be as per Annexure 'D'.]"

The State of Himachal Pradesh had issued a notification on 4th August, 2000 in exercise of the powers conferred under Sections 41 and 42 of the Indian Forest Act to amend the notification dated 20.11.1978 vide Himachal Pradesh Forest Produce Transit (Land Routes) (Amendment) Rules, 2000. "Hypericum Patulum" is mentioned at Sr. No.49 and export permit fee of Rs.250/- per quintal is leviable on this medicinal plant. It is further mentioned in the notification that the export permit fee shall be applicable to all the species which are mentioned in Annexure 'D', whether these species have been collected from the forest or have been produced locally.

Mr. Bhupinder Ahuja had drawn the attention of the Court to the book **"Indian Medicinal Plants"** by Lt. Colonel K.R. Kirtikar and Major B.D. Basu (Volume I). The plant "Hypericum Patulum" has been explained and defined as under:-

"1. Hypericum Patulum:

A evergreen shrub usually 0.6-1.2 m. high but attaining 1.8 m. with stem up to 5 cm. diam. Twigs slender, reddish, appearing somewhat 2-sided owing to the decurrent leaf-bases. Bark reddish brown, fairly smooth. Leaves 15-45 by 8-20 mm, elliptic-lanceolate, entire, acute or with a blunt point, base rounded or

cuneate, lateral nerves easily visible on the undersurface, dull dark green above, pale and somewhat glaucous beneath, distichous, sessile, the leaf-base decurrent and forming a raised lline on either side of the shoot. Flowers 18-30 mm. diam., in few-flowered terminal cymes. Sepals 3.8-6 mm. long, elliptic or suborbicular, obtuse. Petals sub orbicular. Styles about the same length as the ovary. Capsules 5-10 mm long.

Distibution: Khasia Hills, 5,000-6,000 ft.; throughout the temperate Himalaya (except Sikkim), 3,000-7,000 ft., from Bhuttan to the Ravi. – China, Formoss, Japan.

The scented seeds are employed as en aromatic stimulant in Patna, where they are imported from Nepal (Irvine).

In indo China they are used both externally and internally as a remedy for the bite of dogs and the sting of bees.

Bihar: Thumbhul - ; Indo China: Kim ty mai - ; Lepcha: Tumbomri - ; Nepal: Urilo,-.

The medicinal plant “Hypericum Perforatum” has been explained and defined as under:-

“Hypericum Perforatum:

A perennial herb. Stems 30-60 cm., 2 angled. Leaves oblong, 8-25 mm.’ obtuse, veins pellucid, lower surface pale. Flowers 2.5 cm. diam., in terminal corymbs. Sepals narrowly lanceolate, acute, 6 mm., margins often black-dotted. Petals black-dotted on the margins. Stamens in 3 bundles, anthers black-dotted.

Ovary 3-celled; styles 3, twice as long as the ovary. Capsule 8 mm.

Distribution: Temperate W. Himalaya, 600-9,000 ft.: Kashmir, Simla, apparently not in Kumaon. – N. temperate Asia, Europe, N. Africa.

The leaves have a sharp slightly bitter taste; stomachic, laxative, anthelmintic; good in earache and scorpion sting . . . bark diuretic; good for piles and uterine troubles (Yunani).

The herb is bitter and astringent, and recommended as a detersive, resolutive, anthelmintic, diuretic and emmenagogue and, externally as excitant.

It is recommended in Arabian medicine as a vermifuge, also used to cure piles, prolapsus uteri et ani.

The red juice is esteemed as one of the most popular and most curative applications in Europe for excoriations, wounds, and bruises.

An infusion of the herb is given beneficially for chronic catarrhs of the lungs, the bowels, or the urinary passages.

A salve compounded from the flowers is still much used and valued in English villages.

The flower tops are official in France and in Portugal.

The leaves are not an antidote to scorpion venom (Caius and Mhaskar).”

In the dictionary of Indian raw materials and industrial products under the caption the **Wealth of India** published by Council of Scientific & Industrial Research, New Delhi, the family of Hypericum Linn. has been defined as a genus of herbs, shrubs or small trees districhiefly in the temperate regions of the world and 20 species occur in India. The species "H. Patulum Thunb" has been defined as under:-

"H. Patulum Thunb.

Nepal - Urilo; Lepcha – Tumbomri; Bihar – Tumbhul; Assam – La–syn–rit.

A handsome, evergreen shrub up to 6 ft. high, found almost throughout the temperate Himalayas and the Kashi, Jaintia, Manipur and Naga hills of Assam at altitudes of 3,000-7,000 ft. Branches slender, reddish; leaves opposite, sub-sessile with decurrent leaf bases elliptic-lanceolate to ovate; flowers bright yellow, in few-flowered terminal cymes; capsules ovoid, c. 0.4mm. long; seeds aromatic.

The seeds are employed as aromatic stimulant. In Indo-China, they are used both externally and internally for dog bites and bee stings (Kirt. & Basu, I, 255).

The wood is hard and close-grained; it can be worked to a smooth surface (Cowan & Cowan, 17)."

The medicinal plant "H. Perforatum" has been defined thus:-

"H. Perforatum":

Hindi – Bassant, Balsana, dendhu.

A rhizomatous perennial herb up to 3 ft. high, distributed in the western Himalayas at altitudes of

3,000-10,500 ft.; stems 2-edged; leaves opposite, sessile, oblong, ovate or linear, 0.3-1 in. long, black-dotted; flowers yellow, c. I inch in diam., in terminal corymbose cymes; capsule ovoid, 0.3 in. long; seeds many, small.

The herb has a characteristic balsamic odour and a bitter, resinous, somewhat astringent taste. It is reported to possess astringent, expectorant and diuretic properties and has been used in pulmonary and urinary troubles, diarrhea and lately in the therapy of depressional state. It has also been employed as an anthelmintic and emmenagouge. An oil known as St. John's Wort Oil (Oleum Hyperici) is prepared by infusing the fresh flowers in olive oil; it is used externally in the treatment of wounds, sores, ulcers, swellings and sometimes against rheumatism and lumbago; it is also valued as a sunburn oil, and is recommended as a cosmetic application for tightening the skin. An ointment for use as hair restorer has been prepared from the aqueous extract of the plant (U.S.D., 1955, 1720, Wren, 331; Krit. & Basu, I, 255; Perf. Essent. Oil Rec., 1953, 44, 29; Chem. Abstr., 1954, 48, 1637).

The principal constituents of the herb are: volatile oil (yield from flowering herb, 0.06-0.11% according to season), tannins (stems, 3.8; leaves, 12.4; and flowers, 16.2%), a resinous substance and a red fluorescent pigment, hypericin [$C_{30}H_{14}O_{18}$ (decomp. Above 330^0), 0.466%]. The herb also contains rutin, glucosides, alkaloids, a fixed oil, vitamin C (0.13%), provitamin A (up to 13 mg./100 g.) and the pigment pseudohypericin ($C_{30}H_{20}O_{10}$), hyperin [$C_{21}H_{20}O_{12}$; m.p., $237\text{-}38^0$ (decomp.)], carotenoids, chlorophu II and a brownish red pigment. Hypericin has been identified as 4, 5, 7, 4', 5', 7'-hyxahydroxy$^{-2\text{-}2'}$-dimethyl-meso-

naphthodianthrone; hyperin is identicalwith quercetin 3^{-a-d}-galactoside. The fixed oil contains glycerides of stearic, palmitic and myristic acids, ceryl alcohol, phytosterol, and two hydrocarbons ($C^{38}H^{68}$, m.p., 63^0 and $C^{36}H^{74}$, m.p., 68^0) (U.S.D., 1955, 1720; Chem. Abstr., 1957, 51, 8370; 1955, 49, 9231; Heilbron & Bunbury, II 844; Brockmann & Muxfeldt, *Naturwissenschaften,* 1953, 40, 411; Brockmann & Pampus, ibid., 1954, 41, 86; Wehmer, II, 783; Chem Abstr., 1940, 34, 5878; 1954, 48, 6079; 1947, 41, 7673).

The volatile oil obtained by the steam-distillation of the flowering herb shows red fluorescence, often with a greenish tinge; it has the following constants:"

It is evident from the contents of two standard text books that "Hypericum Patulum" and "Hypericum Patulum" belong to the family of Hypericaceae and their genus is also the same, but they are different species. In the notification, i.e. Annexure P-2, dated 4.8.2000 the only species mentioned is Hypericum Patulum at Sr. No.49 on which export permit fee of Rs.250/- per quintal is leviable. The species "Hypericum Perforatum" is not mentioned in the notification, dated 4th August, 2000. In the absence of the "Hypericum Perforatum" being included in the notification no export permit fee could be levied on it. The only explanation put forth by the respondent-State in its reply for levying the export permit fee on "Hypericum Perforatum" is that "Hypericum Patulum" is locally known as Khaarera/Basanti and "Hypericum Perforatum" is locally known as Vasant, therefore, on the basis of local name Basanti being included in the notification dated 4.8.2000, the species "Hypericum Perforatum" is also considered

to be included in the notification. The local name of “Hypericum Patulum” is Basanti-Khaarera and the local name of “Hypericum Perforatum” is Vasant. The two plants belong to different species having different botanical names and the species “Hypericum Perforatum” could not be included in the notification dated 4.8.2000 by implication.

The characteristics of herbs, i.e. “Hypericum Patulum” and “Hypericum Perforatum” are also different. The “Hypericum Patulum” is an evergreen shrub usually 0.6-1.2 meters high and its twigs are slender, reddish, appearing somewhat two-sided owing to the decurrent leaf-bases. The species “Hypericum Patulum” are employed as aromatic stimulant in Patna where they are imported from Nepal. In Indo-China they are used both externally and internally as a remedy for the bite of dogs and the sting of bees. The species “Hypericum Perforatum” has different characteristics and it is used primarily for stomachic, laxative as well as for piles and u uterine troubles. The red juice is esteemed as one of the most popular and most curative applications in Europe for excoriations, wounds and bruises. Thus on the basis of these characteristics and their different medicinal value both the plants “Hypericum Patulum” and “Hypericum Perforatum” are to be treated as distinct species even though family and genus are the same.

It is evident from the language of sub-rule 5 of Rule 11 of the Himachal Pradesh Forest Produce Transit (Land Routes) Rules, 1978 that in case of medicinal plants the fee shall be as

per Annexure 'D". Even though by way of amendment carried out on 4th August, 2000 "Hypericum Patulum" has been included in Annexure 'D', but "Hypericum Perforatum" was never included. Thus, the petitioners are not bound to pay any fee for obtaining the export permit for the export of "Hypericum Perforatum" as demanded by the Divisional Forest Officer, Nachan amounting to Rs.1,40,000/-.

The Hon'ble Supreme Court has held in ***State of W.B. versus Kesoram Industries Ltd. and Others, (2004) 10 SCC 201*** that there is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpreted by expanding its width as to include therein the power to tax by implication of by necessary inference. Their Lordships have held as under:-

> **"There is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpreted by expanding its width as to include therein the power to tax by implication of by necessary inference. States Cooley in Taxation (Vol.1, 4th Edn.):**
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> > **"There is no such thing as taxation by implication. The burden is always upon the taxing authority to point to the act of assembly which authorizes the imposition of tax claimed." (para 122 p. 278).**
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> **Justice G.P. Singh in *Principles of Statutory Interpretation* (8th Edn., 2001) while dealing with general principles of strict construction of taxation statutes states:**

> **"A taxing statute is to be strictly construed. The well-established rule in the familiar words of Lord Wensleydale, reaffirmed by Lord Halsbury and Lord Simonds, means: 'The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words.' In a classic passage Lord Cairns stated the principles thus: 'If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot be bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute.' Viscount Simon quoted with approval a passage from Rowlatt, J. expressing the principle in the following words: 'In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'" (at p. 635).**

The judicial opinion of binding authority flowing from several pronouncements of this Court has settled these principles: (i) in interpreting a taxing statute, equitable considerations are entirely out of place.

Taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency; (ii) before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in the taxpayer escaping if the letter of law fails to catch him on account of the legislature's failure to express itself clearly. (See Justice G.P. Singh, ibid., pp.638-39)

Power to tax is not an incidental power. According to Seervai, although legislative power includes all incidental and subsidiary power, the power to impose a tax is not such a power under our Constitution. It is for this reason that it was held that the power to legislate in respect of inter-State trade and commerce (Entry 42 List I Schedule 7) did not carry with it the power to tax the sale of goods in inter-State trade and commerce before the insertion of Entry 92-A in List 1 and such power belonged to the States under Entry 54 in List II. Entry 97 in List I also militated against the contention that the power to tax is an incidental power under our Constitution (See Seervai, H.M.: Constitutional Law of India, l4th/Silver Jubilee Edn., Vol. 3, para 22.20)."

Since the plant "Hypericum Perforatum" is not included in Annexure 'D' as per Rule 11 of the Indian Forest Produce Transit (Land Routes) Rules, 1978, this Court need not go to the

contention raised by Mr. Bhupinder Ahuja based on sub-Section (4) of Section 2 of the Indian Forest Act, 1927.

Accordingly, the action of the respondents of demanding fee for the export permit for exporting the “Hypericum Perforatum” is bad in law.

Consequently, the writ petition is allowed. The respondents are directed not to levy the export permit fee on the plant “Hypericum Perforatum” and if the same has been realised by the respondents, the petitioners will be entitled to get its refund within eight weeks from today. No order as to costs.

(Rajiv Sharma), Judge.

September 28, 2007 *(sck).*